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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1966

No. 164

AYAKO HONDA, ET AL., AND MASAE KONDO, ET AL.,
Petitioners,

v.

NICHOLAS DeB. KATZENBACH, ATTORNEY GENERAL OF THE UNITED STATES, *Respondent.*

REPLY FOR PETITIONERS

1. The Opposition confirms the essential facts as set out in the Petition,[1] and impliedly confirms by its silence the hardship and injustice to petitioners recognized by both opinions in the Lower Court. However, by reiteration that the Government did not misrepresent or mislead petitioners during the 20 years when their claims were under administrative review, the Opposition seeks to obscure the injustice of denying petitioners the same relief afforded their fellow claimants in 1964 following this Court's grant of certiorari in *Aratani*.

[1] A passing reference in the Opposition (p. 8) may create the misimpression that the numerous petitioners represented in this class action had counsel in 1961 while the statutory limitation period was running. In fact, in 1961 counsel for Honda (see J.A. 9) only represented some 50 claimants, and review of a sample of the files submitted for inspection by the Department of Justice shows that a majority of the 4,100 petitioners were not represented by *any* counsel.

But the Government is simply in error in making misrepresentation the *sine qua non* of equitable estoppel. As emphasized in the dissenting opinion below (Petition, pp. 40, 43), this "most powerful and flexible instrument" cannot be so narrowly circumscribed, particularly in view of this Court's *New York Central* opinion making "given circumstances" in particular situations the criteria for the tolling of limitations. Thus, while misrepresentation provides strong grounds for equitable estoppel or tolling, an equally compelling case arises where the Government wears out thousands of claimants for refund of seized assets with 20 years of administrative delay, finally offering a few pennies' return for their original deposit certificates. Estoppel of limitations under these circumstances is compelled by a confluence of striking equities: that petitioners were confused and discouraged by the Government's long delay, offer of 2% return, and prolix instructions; that delay in suit was entirely excusable and caused no prejudice; that the validity of their statutory claims has been and remains unquestioned; that funds are on hand for their payment; and that the divestiture of the right to return constitutes a manifest injustice recognized even by the majority below (Petition, p. 30). And, beyond all these equities, the circumstances also pose a *traditional* case of estoppel by representation and change of position in reliance; those circumstances are carefully documented in the dissenting opinion (Petition, pp. 43-45), which the Opposition does not even deign to note. They fully support Judge Wright's conclusion that the Government's reversal of its position with respect to ratio of payment following the grant of certiorari in *Aratani*, "cannot become a means, whether intentional or inadvertent, whereby innocent per-

sons who acted in reliance upon the Government's first representation, should be denied the opportunity to recoup monies which Congress wanted returned."[2]

2. The Opposition (pp. 14, 16) submits that this case "does not present a recurring issue," because "the program under the Act has been substantially completed." True, the Court Below ruled that equitable estoppel is not available against a Government plea of limitations under the Trading With the Enemy Act, but nothing in the ruling confines it to that particular statute. Rather, the majority opinion's self-denying stricture against invoking equity powers is based on the generalization that the Government is immune from estoppel and tolling principles such as this Court recently (in *Glus* and *New York Central*) made applicable to private parties in civil litigation. Moreover, even if the majority opinion's "no estoppel against the Government" ruling *had been* limited to the Trading With the Enemy Act, that ruling itself divests these 4,100 loyal citizens of a return of their seized bank deposits. In view of the forfeiture thus inflicted upon so many blameless persons, it could hardly be suggested that

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[2] The Opposition (pp. 14-15) cites a number of cases decided before *Glus* and involving no estoppel claims, wherein Government pleas of limitations were upheld. But the predicate of the cases as tendered by the Government—that statutory limitations are "jurisdictional"—has been rejected by this Court in *Glus* as unpersuasive when estoppel is appropriate (359 U.S. at 234-35, n. 11). Moreover, most of the cited decisions merely bar the Government from liability based upon representations or promises of its agents in excess of their statutory authority. We agree here, as we did in the Court Below, that the United States is not liable for the acts of its officers who "enter into agreements to do what the law does not sanction or permit". But that rule simply has nothing to do with the availability of estoppel or tolling against an inequitable Government plea of limitations.

this is a case of merely individualized injustice unworthy of this Court's concern.[3]

3. Finally, it is notable that the Opposition (p. 19, n. 13) misstates instead of answering petitioners' constitutional point. That point (see Petition, pp. 15-16) is not that a 60-day period of limitation "is constitutionally inadequate"; rather, it is that a significant Fifth Amendment issue arises if the Government can summarily seize private property and then may (because of "sovereign immunity") successfully plead a slim limitations period in bar of relief under equitable circumstances which would estop a private-party defendant. In the Government's view, it may seize property without judicial process, consume twenty years in administrative review of claims upon the seized funds, and then hide behind inexorable limitations to reject a citizen's concededly valid claim no matter how reasonable was delay in suit and how unjust may be the resulting divestiture. We cannot bring ourselves to believe that sovereign immunity allows such Government taking and keeping with impunity.

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[3] The Government advises this Court (Opposition p. 12, n. 5) that the Attorney General now "stands ready to make payment" of the amount claimed in petitioner Kondo's suit, whose dismissal the Court Below affirmed. This back-door confession of error—compelled by the manifest indefensibility of the Government's refusal to pay this claim (see Petition p. 10, n. 5)—was first made in a letter offer by the Attorney General to petitioners' counsel after the Petition for Certiorari had been filed in this Court and while the Government was preparing its Opposition. The eleventh-hour offer is reminiscent of the Government's 1964 *Aratani-Abe* settlement (at 100% of the principal) with the claimants in those cases following this Court's grant of certiorari. See 375 U.S. 877; 376 U.S. 936; 380 U.S. 938; Petition, p. 3. Apparently the Government pursues a game of litigating brinkmanship, doing justice in single unconscionable OAP cases when faced with the likelihood of this Court's remedial review, and affording justice to a larger number of deserving claimants only when certiorari has been granted.

A meritorious issue for review is presented under any circumstances by a ruling that courts are powerless to estop or toll limitations pleas by the Federal Government. Certiorari is doubly appropriate when such a ruling comes in a case of summary Government seizure of private funds and innocent citizens are unjustly barred from restitution. It is triply so, as underlined by the "Memorandum of the State of California as Amicus Curiae", when the wronged citizens are the same class of persons who suffered so much in the past at the hands of the Government which seized their bank deposits and now inexplicably resists their return.

Respectfully submitted,

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